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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1935

No. 195

UNITED STATES OF AMERICA,
Petitioner,

against

BANK OF NEW YORK AND TRUST COMPANY,
Respondent.

ON CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR ASSECURANZ UNION VON 1865, INTERVENOR.

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Of Counsel for ASSECURANZ UNION VON 1865.

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BRIEF FOR ASSECURANZ UNION VON 1865, INTERVENOR.

Statement.

The Assecuranz Union von 1865, hereinafter called "Assecuranz Union" was granted by the District Court leave to intervene in this case as having an interest in the funds here in controversy (R. 111). Its petition, thereafter filed herein, appears in the Record on page 113, *et seq.* The findings of the Referee in the State Court proceedings (the *Lucke* case), insofar as they directly concern the claim of Assecuranz Union will be found in the Record

on page 64. The judgment in the State Court proceedings entered in favor of the intervenor and directing payment thereof appears in the Record at page 41.

Assecuranz Union is a German insurance company. Its claim against the funds of the Moscow Fire Insurance Company, hereinafter called the "Russian Company", is based upon a contract made in Germany in 1916 directly after the promulgation of a Russian ukase, by the terms of which all Russian subjects were forbidden to enter into any agreement or commercial relation whatever with citizens of enemy countries, and which proclaimed that all existing relations by virtue of contracts with enemy firms must be considered as at an end from the date of promulgation. Violation of the decree was punishable by imprisonment and fine. The German contract was executed on behalf of the Russian Company by Heckscher & Gottlieb of Berlin, Germany, who were general agents of the Russian Company and controlled its extensive reinsurance business outside of Russia in the several countries of Europe and other parts of the world.

By the terms and conditions of the contract certain outstanding reinsurance obligations of the Russian Company accrued on the date of the contract or thereafter to accrue, were to be assumed by Assecuranz Union by a series of novations with the direct writing companies involved, the final account between the two companies to be stated after the running off of the business and the payment of all outstanding losses by Assecuranz Union.

The report and findings of the Referee in the State Court proceedings (the Lucke suit), insofar as they directly relate to the claim of Assecuranz Union are as follows:

> "The defendant Assecuranz Union von 1865 is an insurance corporation of Cologne, Germany. Prior

to the promlugation of the Russian decree of November, 1916, which prohibited intercourse between Russian and German nationals, the Moscow Company had become reinsurer under various treaties of reinsurance made between the Moscow Company and German and Austrian companies, among others, the Aachen and Munich Fire Insurance Company, the Berlinische Fire Insurance Company and the Bavaria Insurance Bank Company, Ltd. When this decree of November, 1916 was issued by the Russian Government it became necessary to substitute another company as reinsurer under these various treaties of reinsurance.

"Accordingly, the defendant Assecuranz Union von 1865 was so substituted under an agreement and arrangement which provided that the Assecuranz Uuion von 1865 would be reimbursed by the Moscow Company for the net amount of any loss sustained by the Assecuranz Union because of such substitution.

"The proof establishes that there did result a loss to the said Assecuranz Union von 1865. This loss is represented by the amount paid by the Union on or prior to July 1, 1927, the date of the last entry in the Assecuranz Union accounts with the Moscow Fire Company. The items were represented by different classes of currency as follows:

Reichmarks	495.23
Dutch florins	2,681.25
Swedish Kronen	7,329.27

"Inasmuch as these amounts were carried by the Assecuranz Union in a running account the rate of exchange should be taken as of the time when the account came to an end, rather than, as contended by the claimant, that the rate of exchange should be taken as of each date that the money became due under the contract. In other words, the proper holding should be that the cause of action arose on July 1, 1927, and the rate of exchange should be fixed accordingly at the date of breach, exclusive of interest (*Gross* v. *Mendel*, 171 App. Div. 237; aff'd 225 N. Y.

633; *Hoppe* v. *Russian Asiatic Bank*, 253 N. Y. 37; *Park* v. *Hoppe*, 257 N. Y. 333, 341; 258 N. Y. 365).

"On this basis as of July 1, 1927, the indebtedness represented by these various currencies converted into dollars was the equivalent of $3,155.12 in United States currency" (R. 64).

No attempt will be made to cover in this argument the general propositions involved in the three cases submitted jointly to this Court in the Government's brief which have been argued at length in the briefs submitted on behalf of the respective respondents.

Synopsis of Argument.

I. The rights of Assecuranz Union arising out of the contract made in Germany are unaffected by Soviet laws or decrees.

II. The power of a State to deal with property located within its territory through its judicial process, subject only to constitutional limitations, is absolute and exclusive.

III. The State of New York by its laws and through its courts has assumed control of the property in question here and has directed that it be used, to the amount required, for the discharge of debts of the Russian Company due its foreign creditors.

IV. The United States suing here as an assignee of the Soviet Government is not the real party in interest, but comes into this court as representing the Soviet Government and in its interests, in an effort to enforce extraterritorially the Soviet confiscatory decrees.

ARGUMENT.

I.

The rights of Assecuranz Union arising out of a contract made in Germany are unaffected by Soviet Laws or Degrees.

The judgment and findings of the State Court to the effect that there was a valid contract made in Germany in 1916 between Assecuranz Union and the Russian Company are not open to collateral attack, and effectively silence any question as to the authority of Heckscher & Gottlieb and the validity of the contract under the laws of Germany.

The facts of the case here are closely analogous to the facts before this Court in *Second Russian* v. *Miller,* 268 U. S. 552. There it was claimed that a contract made outside Russia between a German general agent of a Russian insurance company and a New York firm of insurance agents, respecting the Russian Company's business was void because directly within the prohibitions of the Russian ukase issued in October 1916 prohibiting intercourse between Russian subjects and subjects of countries then at war with Germany.

This Court said (p. 559):

> "In view of the legal relationship existing between Meinel and the Mutzenbechers and the legal consequences which flow from it, we find it unnecessary to speculate as to the precise meaning and effect of the Russian ukase. The Circuit Court of Appeals below rejected the contention that it should be given extraterritorial effect so as to make illegal the transactions had in New York between appellant and Meinel with respect to their dealings with the German firm.

> Certainly such an application of foreign law to acts done within the territorial jurisdiction of the forum carries the principle of the adoption of foreign law by comity much beyond its limits as at present defined, the more so as the contract between a Russian and a German which we are asked to hold illegal on the basis of Russian law is shown by expert testimony in the case to be valid according to the German law. * * * Nor does *Canada Southern Railway Co.* v. *Gebhardt,* 109 U. S. 527, relied upon by appellant, support the contention. That case only laid down the doctrine recently affirmed by this court (*Modern Woodmen* v. *Mixer,* 267 U. S. 544) that the legal relations of the members of a corporation to the corporation and to each other must be regulated and controlled by the law of the jurisdiction in which the corporation is organized, and it extended the doctrine so as to make it applicable to mortgage security holders having a common interest in the corporate property. The Russian ukase however, did not purport to regulate the internal relations of the corporation to its members or lien holders. By its terms it is applicable indiscriminately to individuals and all classes of associations and corporations, and apparently undertakes to deal with contracts of every kind."

It is to be noted that no question of confiscation for a clash with public policy was presented in the *Miller* case. The Russian ukase of October 1916 was recognized as a legitimate use of war power.

Here we have a German general agent of a Russian company undertaking a salvage operation in the interests of his principal to save that principal from the possible disastrous effects of the 1916 Ukase. The confiscatory decrees of the Soviet Government can certainly have no greater effect extraterritorially upon the liabilities incurred by the German agent on behalf of his principal than did the Czar's Ukase of 1916 upon contractual relations between the parties in the *Miller* case.

II.

The power of a state to deal with property located within its territory, through its judicial process, subject only to constitutional limitations, is absolute and exclusive.

In petitioner's brief, page 42 *et seq.*, it is contended that the situs of the securities comprising the larger part of the funds in question here was under the doctrine of *Mobilia sequuntur personam* not in New York but in Russia, and in support of this contention *Farmers Loan Co.* v. *Minnesota,* 280 U. S. 204, and other authorities are cited. In the brief filed on behalf of the respondent Bank of New York and Trust Company, the inapplicability of the decisions cited to the case at bar has been pointed out and to set out those reasons again in this brief would be mere repetition. It is proper to point out that the New York Insurance Law regulating the establishment of branches within that state, of foreign insurance companies, is drawn with the express purpose, through the medium of statutory deposits and the establishment of trust funds in the hands of trustees who are required to be residents of the state, to create a New York situs for such deposits and funds; to place their control in the state officer having the power of supervision, regulation and liquidation in proper case; and to make them completely subject to the jurisdiction of the courts of the state. In case of statutory deposits with the Superintendent of Insurance, the bonds are required to be registered in his name or are bearer bonds of which he has physical possession. As to the trusts, the legal title is placed in the resident trustee, and in case of liquidation by court order that legal title is transferred by law to the state officer in charge of liquidation.

In *Pennoyer* v. *Neff*, 95 U. S. 714, this court speaking through Mr. Justice Field said (p. 722):

> "The several states of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent states, and the principles of public law to which we have referred are applicable to them, *One of these principles is, that every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory.*" (Italics ours.)

This principle has been repeatedly announced and enforced by this Court in a long line of authorities, one of the most recent being *Clark* v. *Williard*, which was twice before this court (292 U. S. 112; 294 U. S. 211). The case came here from the Supreme Court of Montana on certiorari. It involved the application of assets located in Montana which had been the property of an Iowa Insurance company (Federal Surety Company). This Company had been taken over for liquidation by the Iowa Insurance Department, the Company itself dissolved, and the Iowa Superintendent was under the laws of that state the statutory successor of the defunct corporation, with legal title to its assets.

The principal question involved on the first appearance of the case in this court (292 U. S. 112), was whether the Montana court had ignored the "full faith and credit clause" of the Federal Constitution, in refusing to recognize Clark as having the legal title to property of the Surety Company located in Montana by virtue of the Iowa law investing him with that title. This court held that the Montana court erred in refusing to recognize the Iowa Liquidator as the statutory successor of the Surety Company, with title to its property wherever situate, and remanded the case for further proceedings. In those

subsequent proceedings the Montana court, while bowing to the decision of this court to the extent of acknowledging Clark as the statutory successor of the defunct corporation, with legal title to its assets although such assets had a situs in the State of Montana, held that the local policy of that state was to permit attachments and executions against insolvent corporations, and that the writs would not be halted though the effect of the levy be waste or unequal distribution.

The case came to this Court again on certiorari (294 U. S. 211), and it was held that that pronouncement of state policy was final and binding as to property located in the State of Montana.

In the course of the opinion it was said (p. 213);

> "Every state has jurisdiction to determine for itself the liability of property within its territorial limits to seizure and sale under the process of its courts (Citing authorities). Montana does not challenge the standing of this foreign liquidator as successor to the dissolved corporation or as owner of its assets. On the contrary his standing and ownership are now explicitly conceded. All that Montana does by the decree under review is to impose upon such ownership the lien of judgments and executions in conformity with local law. * * *. If the corporation were still in being, and still the owner of the assets, its ownership would be subordinate to the process of the local courts. So much would be conceded everywhere. If title had been conveyed to an assignee for the benefit of creditors by a common law assignment or by insolvency proceedings, claimants in Montana might pursue their suits and remedies in derogation of the assignment when the law or policy of the locality ordained that this result should follow. So much again is settled by unimpeachable authority (Citations). The principle of these decisions applies with undiminished force to a statutory successor. In respect of his subjection to the power of the local law his position is no better than that of the dissolved corporation to whose title he has succeeded, or of its voluntary assignee upon a trust for all the creditors.

He must submit, as must they, to the mandate of the sovereignty that has the physical control of what he would reduce to his possession. Disconto Gesellschaft v. *Unbreit,* 208 U. S. 570; *City Bank Farmers Trust Co.* v. *Schnader,* 293 U. S. 112; *Cooper* v. *Philadelphia Worsted Co.,* 68 N. J. Equity, 622."

For the purposes of this case and under the doctrine of *United States* v. *Buford,* 3 Pet. 12, 30, the United States as the assignee of the Soviet Government stands in no better position than would that Government if it voluntarily submitted itself to the jurisdiction of our courts to gain possession of this property. If one of the sovereign states of the United States fortified by the "full faith and credit" clause of the constitution, is powerless to interfere with the disposition of the property of one of its corporations by a sister state within whose territorial jurisdiction such property is situate, it would seem preposterous to contend that a foreign government, although recognized by the United States as such, would stand in any better position.

III.

The State of New York by its laws and through its courts has assumed control of the property in question here and has directed that it be used to the amount required for the discharge of debts of the Russian Company due to foreign creditors.

The petitioner argues at great length that the final order in the liquidation proceedings in the State Court directing the residue of the property of the Russian Company to be delivered to the Bank of New York "as agent or depositary" of the Russian Company and to Paul Lucke as "surviving director and conservator" terminated the

jurisdiction of the court in the special proceeding instituted in 1925 for the liquidation of the United States Branch of the Russian Company. The argument does not bear analysis.

There being no domiciliary receiver or other liquidating agency at the domicile of the corporation to which the New York Liquidator could account for the residue in his hands, it was urged upon the New York Courts that the fund should be retained in the possession of the Superintendent of Insurance until some government in Russia be recognized by the United States. Another alternative that was suggested was that the funds be declared escheat to the State. Both alternatives were rejected by the New York Court of Appeals. These Russian cases were all argued and decided together, and the policy of the State of New York is to be gathered from the expressions of the Court in all the opinions.

In the *Matter of People-Russian Reinsurance Company and First Russian Insurance Company,* 255 N. Y. 415, the Court, speaking by Cardozo, Chief Judge, clearly outlines the State policy (pp. 422-423):

> "Holding as we do that the surplus must be made available for the payment of creditors and policyholders with claims founded upon foreign business, there remains the question of the remedy. * * * The fund being thus subjected to the remedy of creditors, the question must still be answered how the surplus is to be disposed of after such claims have been allowed. We think the surplus then remaining should be paid to the corporations, represented by directors, a quorum of the board."

It happened that in the case of the Russian Reinsurance Company and First Russian Insurance Company there were surviving a majority of the Board of Directors of each company to whom delivery could be made, and admittedly such a delivery would terminate the State Court's jurisdiction in the special proceeding.

When the Court came to deal with the disposition of the Moscow Fire Insurance Company's funds a different situation confronted it. A single director (Lucke) survived, who had also been General Manager of the Company. While recognizing him as a conservator and in furtherance of the same purpose, that the fund should reach the foreign creditors and stockholders, the Court conceived it its duty for the purpose of insuring the proper disposition of the funds, to attach a condition to their delivery to this sole conservator. The language of the Court of Appeals was (255 N. Y. 435):

> "Directors less than a quorum may be treated as conservators of the property of their companies when there are assets within the state that might otherwise be lost. (Citation.) Even so, a court of equity will exercise a measure of discretion before surrendering possession to claimants whose powers and duties are born of an emergency."

Accordingly, it was adjudged that Lucke as conservator should give a satisfactory bond to insure his carrying out the Court's orders. In the alternative the funds were to be delivered to the Bank of New York as agent and depositary for the Russian Company and its conservator, to be disbursed only upon the order of a court of competent jurisdiction.

Again, had the condition been complied with and the bond furnished, it may be admitted that a delivery in these circumstances would terminate the jurisdiction of the special proceeding, as creditors and stockholders would have the bond to look to in case of misapplication of any part of the funds. The second alternative however was chosen and a different situation arose.

It is clearly settled in equity that the jurisdiction of a Chancery Court continues beyond the entry of the final decree and remains existent for the enforcement of the terms of such final decree. (*Pease* v. *Rathbun-Jones Engineering Co.*, 228 Fed. 273; aff. 243 U. S. 273; *Waterworks*

Co. v. *Kansas City,* 65 Fed. 691.) A special proceeding under the New York practice is in its nature equitable and would in ordinary course be controlled by the recognized principles of equity. We need not however rely upon the cases. The New York Legislature has provided by law that

> "a special proceeding does not abate by any event if the right to the relief sought in such special proceeding survives or continues." (New York Civil Practice Act, §82)

Is it open to argument that in this case an application could have been made in the special proceeding for an injunction or other appropriate remedy if an attempt had been made my Lucke to withdraw any part of the fund deposited in the Bank of New York without a court order authorizing him so to do? It is submitted that there was no termination or interruption of the jurisdiction of the New York Court in the special proceeding instituted therein for the liquidation of the American funds of the Russian Company until the institution of the Lucke suit and the assumption by the New York Courts of jurisdiction in that suit insured the carrying out of the use imposed upon these funds by the final order entered in the special proceedings.

The commencement of Lucke's suit, its control of the funds in the Bank of New York and the effect of the judgment entered in that suit in the New York Supreme Court have been fully treated in the other briefs and any argument here on that point would be repetition.

IV.

The United States suing here as an assignee of the Soviet Government is not the real party in interest, but comes into this court as representing the Soviet Government and in its interests in an effort to enforce extraterritorrially the Soviet confiscatory decree.

The argument in the respondent's brief in support of the judgment in the District Court, where it was held that the assignment which was relied upon as the basis of the cause of action herein sought to be enforced did not include these funds, makes it unnecessary to cover that ground in this brief. Another and striking phase of the assignment deserves serious consideration.

Throughout the petitioner's brief it is assumed as beyond question that here the Government of the United States is asserting its rights to these funds as a *bona fide* assignee for value, by virtue of the so-called assignment to it executed by the duly accredited representative of the recently recognized Government of Soviet Russia, of all Russian property of whatsoever kind that may be found in the United States. It is submitted that the most casual examination of the Litvinoff letter addressed to Mr. Roosevelt (R. 20) negates any such assumption. In the first paragraph of the letter the agreement evidenced thereby with respect to the claims and counterclaims between the Governments of the two countries and their nationals is declared to be "preparatory to a final settlement of the claims and counterclaims between the Governments of the Union of Soviet Socialist Republics and the United States of America."

No consideration for the assignment is recited in the letter, the clear intention being that the United States is to be permitted to collect and receive the Russian

property and credits described in the letter and located in this country to hold the same for appropriate accounting to be finally had between the two governments. Any doubt as to this intention of the parties is removed by the further provision contained in the letter that the Soviet Government "is to be duly notified in each case of any amount realized by the Government of the United States from such release or assignment."

It is to be noticed that this letter and the President's reply thereto (R. 21) contain no statement or admission of present liability of either party to the other. The final accounting is to determine whether the Soviet Government owes the United States a balance of account or whether the liability is the other way. In the meantime the amounts which may be collected by the United States and which must be reported as the same are collected are credit items to the Soviet Government to be used in such final accounting.

There is nothing in the arrangement open to criticism, so long as the letter is construed to apply, as it clearly states, to "amounts admitted to be due or that may be found to be due" to the Soviet Government as successor of prior Governments of Russia or otherwise from American nationals, including corporations, companies, partnerships or associations, etc.

When however it is sought to stretch the language employed to include property located here of former Russian corporations, the only claim to such property admittedly being the confiscatory decrees of the Soviet Government, the entire transaction takes a very different aspect. By the arrangement agreed upon the United States Government becomes the voluntary agent for enforcement on behalf of the Soviet Government of claims resting entirely upon Soviet decrees which are directly contrary to the public policy of the State of New York and to the Government of the United States as declared by other Courts.

To say the least, the assumption by the United States Government of the role of agent to recover these funds for the benefit of the Soviet Government, in the face of its own repeatedly declared public policy, is surprising.

What shall we say when there is added the realization that the Government of the United States is here seeking to override the actions of our Courts which have been expressly confirmed and ratified by the Soviet Government.

We direct attention to very significant language in Mr. Litvinoff's letter of November 16, 1933, where he states:

> "The Government of the Union of Soviet Socialist Republics will not take any steps to enforce any decisions of courts or initiate any new litigations for the amounts admitted to be due or that may be found to be due it * * *."

Also:

> "The Government of the Union of Soviet Socialist Republics further agrees, preparatory to the settlement referred to above, not to make any claim with respect to:
>
> * * * * * *
>
> (b) acts done or settlements made by or with the Government of the United States, or public officials in the United States, or its nationals, relating to property, credits, or obligations of any government of Russia or nationals thereof."

What is the explanation of such unusual language and undertaking? We can do no better in framing the answer to this query than to quote the editorial comment of the American Journal of International Law published in January 1934:

> "* * * One of these special concessions is the release and assignment to the Government of the United States of all amounts due under American court decisions to the Russian Government as the successor of prior governments in Russia,

or otherwise, from American nationals and the undertaking that, pending the final settlement of all other claims, the Russian Government will not make any claim with respect to judgments rendered or to be rendered by American courts relating to property, or rights, or interests in which the Russian Government, or its nationals, have or claim to have an interest, or with respect to acts done or settlements made by or with the Government of the United States or its nationals relating to property, claims or obligations of any government of Russia or nationals thereof. *This last stipulation is apparently intended to obviate legal difficulties which might otherwise arise on account of the retroactivity of recognition which in law relates back to the date of the origin of the recognized government, thus legalizing all intermediate acts of that government.*" (Italics ours.)

The argument of the Government is based upon the generally conceded retroactive effect of recognition, and it is urged that as a consequence this Government is bound to recognize the legal effect of these confiscatory decrees.

Assuming for the sake of argument, that the funds in controversy came within the scope of the so-called "assignment" contained in the Litvinov letter of November 16, 1933, the Government faces the fact that the Soviet Government by the same letter has ratified and legalized the disposition of these funds by the Courts of this Country. In other words, the Soviet Government as to these funds has waived the retroactive effect of the recognition and agrees to abide by the disposition of the funds as determined under our laws. Whether we view our Government as assignee or as a mere collecting agent of the Soviet Government, the rights that have been passed to it can be no greater than the rights of its assignor or principal and are subject to the limitations voluntarily created and acknowledged by the original possessor of those rights.

Conclusion.

We submit that the so-called assignment by the Soviet Government to the Government of the United States, even if it be held to have included by its terms the funds in question here, is powerless to defeat the payment of the intervenor's claim which has been reduced to judgment in the Courts of New York.

Respectfully submitted,

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